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NO. 25748

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
GREGORY C. DRIESSEN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(KA'U DIVISION)
(CASE NOS. E-96387H, E-96388H, E-96389H)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Gregory Chris Driessen (Driessen) appeals the October 14, 2003 judgment of the district court of the third circuit¹ that convicted him, after a bench trial, of the charges of driving under the influence of intoxicating liquor,² driving

¹ The Honorable Joseph P. Florendo, Jr., judge presiding.

² Hawaii Revised Statutes (HRS) § 291-4(a) (Supp. 1996) provided:

(a) A person commits the offense of driving under the influence of intoxicating liquor if:

- (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
- (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath.

HRS § 291-4 has been superseded by HRS § 291E-61(a) (Supp. 2003).

without a license,³ and driving without a current safety check.⁴ On appeal, Driessen argues insufficiency of the evidence. We affirm.

I. Background.

As a result of various stipulations of fact and documents admitted unopposed into evidence, the only issue at trial was whether Driessen was driving the Volkswagen van involved in the accident that led to his arrest.

For the State, Sherry Andrews (Andrews) testified that on May 18, 1996, between 1:00 and 1:30 in the afternoon, she was driving west on Princess Ka'iulani Boulevard, approaching the intersection with Tiki Lane where she would have the right-of-way, when she looked to her right and saw a Volkswagen van heading down Tiki Lane towards the stop sign. "And it was going fairly fast and it didn't look like it was going to stop." At that point, Andrews could see the male driver through the driver's side window. Andrews attempted to stop, but a collision seemed imminent and unavoidable, so she closed her eyes. When she opened her eyes again after impact, her car was coasting across the intersection and the van was flipped over on its

³ HRS 286-102(a) (1993) provides that, "No person . . . shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles."

⁴ HRS § 286-25 (1993) provides that, "Whoever operates, permits the operation of, causes to be operated, or parks any vehicle on a public highway without a current official certificate of inspection, issued under section 286-26, shall be fined not more than \$100."

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passenger's side, skidding down the road. Andrews remained in her car until help arrived. In the meantime, "after I kind of composed myself," Andrews saw "a big person" emerging from the shattered windshield of the van, backwards. "The back end, the butt end coming out, yeah." No one else came out of the van. The driver of the van and the "big person" who exited the van were one and the same, and Andrews identified Driessen as that man.

On cross-examination, Andrews acknowledged that she did not see a passenger in the van, nor did she see anything or anyone in the back of the van. "I didn't see anyone except the driver." When asked how she felt when her car coasted to a stop and she opened her eyes, Andrews replied, "Disoriented, not sure what had happened except that I knew I was in an accident but not really sure of what was going on."

Peter Day (Day) testified that his house is located at the intersection. At the time of the accident, he was cleaning his front yard, which runs along Princess Ka'iulani Boulevard. He saw Andrews in her car approaching the intersection. "So I saw her coming down, oh, okay, and next thing I heard was boom, and that's when I -- wow, accident. . . . No, I didn't see it. I only heard it." Day immediately went over to Andrew's car and confirmed that she was all right. He then went over to the van to see if the man who had come out through the windshield was all right. "He said he was all right and then he said, 'She hit

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me.'" Day identified that man as Driessen. Day did not see anyone else present in the van, emerge from the van or leave the vicinity of the van. On cross-examination, Day confirmed that he did not see the accident and thus, did not see who was driving the van.

Hawai'i County Police Department officer Daniel Freeman (Officer Freeman) testified that he was assigned to investigate the accident. When Officer Freeman arrived on the scene, another police officer was already there and pointed out Driessen as the driver of the van. Officer Freeman asked Driessen for his driver's license, but Driessen was unable to provide one. Officer Freeman described Driessen's demeanor: "He had red glassy bloodshot eyes, he staggered, unsteady on his feet. He had an odor emitting from his body that appeared to be of an alcoholic beverage."

Hawai'i County Police Department officer Mitchell Higashide (Officer Higashide) testified that he responded to the scene of the traffic accident. "And I saw this gentleman walking about in the area of the vehicle. . . . The van." Officer Higashide asked Driessen for his driver's documents, but Driessen could not produce any. Officer Higashide also ran checks on the van and discovered that its safety check had expired. Officer Higashide remembered that Andrews identified Driessen as the other person "involved in the traffic accident[.]"

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Driessen was the only witness in his defense. He denied he was driving the van. He maintained, instead, that he was a passenger in the back of the van. Driessen, who lives in a house on Tiki Lane about a mile mauka of the accident site, remembered that a man named Wendell drove the van to his house that day. Driessen had met Wendell at some earlier time. "He's a guy I met down at the beach. I don't really know Wendell very well." Driessen had helped Wendell buy the van. He had seen the van for sale by the side of the road and had informed Wendell it was being offered.

Wendell arrived that day with beer. They started drinking. At some point, Driessen lay down in the back of the van and took a nap. Wendell decided to leave. "Well, I was just laying down in the back of the van and he took off so I went with him, yes." Wendell was speeding down Tiki Lane when the collision occurred. When the van stopped spinning around, Driessen crawled out through the windshield and went to check on Andrews. "When I came back Wendell was gone. He took off in the rocks." Driessen remembered that the police asked him to take the field sobriety test and some other tests. "He asked me to so I said, 'Okay, you know, sure,' but I told him I wasn't driving. I did what they told me to do."

On cross-examination, Driessen remembered that he first met Wendell a couple of days before the accident, and had not seen him since. He denied telling the investigating police

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officers that he formerly owned the van but had sold it to Wendell for \$300, attributing the discrepancy to miscommunication. When asked whether he had told the police he was thrown through the windshield onto the street, Driessen initially claimed a lack of memory but ultimately concluded that he crawled out and ended up in the street. When asked whether he had told the police he first met Wendell when he picked him up hitchhiking that day, Driessen at first claimed they were both hitchhiking, but then admitted, "You know, I'm not sure exactly. I'm not sure, I'm sorry."

The district court found Driessen guilty as charged:

Ms. Andrews was the operator of the other vehicle involved in the collision and she identified the defendant as the driver. Mr. Day came upon the scene almost immediately after the accident. He did not see any other person either within or without the van. The defendant's testimony regarding his relationship with Wendell is not convincing in light of the inconsistencies of his statement today and those given at the scene. So based upon that, I'll find that the State has proven beyond a reasonable doubt that the defendant committed the [three charged offenses].

During allocution, Driessen continued to insist that he was not the driver. The district court responded:

We'll straighten it out today. So you can appeal. You can talk to your attorney about appealing. I can only rule on the evidence presented. I found the State's evidence convincing to me.

Your story is, to put it mildly, filled with holes. It's improbable. There's no evidence to support it other than your testimony. The other driver saw what happened. She identified you as the driver.

II. Discussion.

For his sole point of error on appeal, Driessen contends there was not substantial evidence adduced at trial that

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he was the driver. Driessen makes a number of arguments in this regard.

First, Driessen notes that Andrews was the only witness who could claim to have seen him driving the van. Driessen asserts that her testimony was suspect because she had closed her eyes in anticipation of impact. Driessen also questions how Andrews could make a reliable identification of the driver under the press of events in the split second she was attempting to avoid impact. As for Andrews' observation of him climbing out of the van, Driessen argues that, "Andrews was not observing the van to see whether someone else had climbed out of the van before Driessen as she was 'disoriented' and confused and several minutes passed before she composed herself and looked over at the van." Opening Brief at 8. Finally, Driessen notes, "Neither was there any objective physical evidence that Driessen had been operating the van, such as his fingerprints on the steering wheel, or circumstantial evidence such as proof that Driessen was the owner of the van or evidence that he had been previously seen driving the van at any time prior to the accident." Opening Brief at 11.

In other words, Driessen attacks the sufficiency of the evidence adduced at trial. Accordingly, we employ the standard of review for sufficiency of the evidence;

namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to

support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Sufficient evidence to support a prima facie case requires substantial evidence as to every material element of the offense charged. Substantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Under such a review, we give full play to the right of the fact finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact.

State v. Ferrer, 95 Hawai'i 409, 422, 23 P.3d 744, 757 (App. 2001) (citation and internal block quote format omitted).

As quoted above, the district court found the State's witnesses credible and Driessen not credible. We will not second-guess its assessment in this respect. In re Doe, 95 Hawai'i 183, 197, 20 P.3d 616, 630 (2001); Ferrer, 95 Hawai'i at 422, 23 P.3d at 757. As for Driessen's point that only Andrews gave direct evidence that he was driving the van, the testimony of a single witness, if found credible by the trier of fact, may constitute substantial evidence to support a conviction. In re Doe, 95 Hawai'i at 196-97, 20 P.3d at 629-30. Considering the evidence, detailed above, in the light most favorable to the State, there clearly was substantial evidence adduced at trial sufficient to support Driessen's conviction, Driessen's criticisms of the evidence notwithstanding. Ferrer, 95 Hawai'i at 422, 23 P.3d at 757.

III. Conclusion.

Accordingly, the district court's October 14, 2003 judgment is affirmed.

DATED: Honolulu, Hawai'i, August 9, 2004.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
State of Hawai'i,
for defendant-appellant.

Acting Chief Judge

Associate Judge

Kimberly B.M. Taniyama,
Deputy Prosecuting Attorney,
County of Hawai'i,
for plaintiff-appellee.

Associate Judge